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No.

In the

Supreme Court of the United States

October Term, 1998

LINDA DARLENE LANGFORD,

Petitioner,

v

MAKITA CORPORATION OF AMERICA;
MAKITA U.S.A., INC., AND
MAKITA CORPORATION

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER'S FUNDAMENTAL RIGHTS TO FAIR, IMPARTIAL AND EQUAL JUSTICE WERE DENIED BY THE FAILURE OF BOTH THE COURT OF APPEALS AND THE DISTRICT COURT TO FOLLOW THE *ERIE* DOCTRINE IN FAILING TO APPLY AND FOLLOW STATE LAW BY GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER AND WHETHER, BY FAILING TO FOLLOW THE *ERIE* DOCTRINE, THE COURT OF APPEALS AND THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

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OPINIONS BELOW

The Magistrate for the United States District Court for the Northern District of Mississippi (Eastern Division) rendered the Memorandum Opinion, September 2, 1998, and is set forth in the Appendix, p. 3. The Magistrate's Final Judgment is also dated September 2, 1998, and is set forth in the Appendix, p. 8 These are unreported.

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1, and is reported at 181 F.3d 96. A timely petition for rehearing was filed and was denied on June 16, 1999. The order denying the petition for rehearing is set forth in the Appendix, p. 9.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C.A. Section 1254. The United States Court of Appeals for the Fifth Circuit issued its denial for Langford's petition for rehearing on June 16, 1999. This Petition was timely filed within 90 days of the panel rehearing denial, and thus is timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Miss. Code Ann. § 11-1-63 (1993). Product liability actions; conditions for liability; what constitutes defective product.

In any action for damages caused by a product except for commercial damage to the product itself:

(a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) 1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary

knowledge common to the community.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug,medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance

of the dangerous condition.

(e) In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)3 of this section, the manufacturer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; and

(ii) The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible designalternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

(g)(i) The manufacturer of a product who is found liable for a defective product pursuant to subsection (a) shall indemnify a product seller for the costs of litigation, any

reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(ii) Subparagraph (i) shall not apply unless the seller has given prompt notice of the suit to the manufacturer within thirty (30) days of the filing of the complaint against the seller.

(h) Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.

STATEMENT OF THE CASE

The statutory provision for the jurisdiction of the United States DistrictCourt for the Northern District of Mississippi (Eastern Division) is 28 U.S.C.A. Section 1332, based upon the complete diversity of citizenship of the parties, with the amount in controversy being in excess of $75,000.00.

This Court should grant *certiorari* review because the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the United States District Court for the Northern District of Mississippi, as to call for an exercise of this Court's supervisory power. When the district courts of the United States fail to apply the appropriate legal standards, and when such failure is sanctioned by the appellate courts of the United States, the fundamental rights of individuals to fair, impartial and equal justice are denied.

The Petitioner, Linda Darlene Langford, was seriously injured at her place of employment, Belmont Homes, Inc., in Belmont, Mississippi, on February 10, 1995, while using a Model LS1020 miter saw manufactured by the Respondents (hereinafter also referred to as "Makita"). Langford filed suit against the Respondents in the United States District Court for the Northern District of Mississippi (Eastern Division) on May 5, 1997. Jurisdiction was based upon complete diversity of citizenship pursuant to 28 U.S.C.A. Section 1332, with the amount in controversy being in excess of $75,000.00. Venuewas proper in the United States District Court for the Northern District of Mississippi (Eastern Division) pursuant to 28 U.S.C.A. Section 1319(c).

An amended complaint was filed on July 22, 1997. The Magistrate entered an order on February 24, 1998, granting Langford leave to file a second amended complaint, and a second amended complaint was filed by Langford.

Respondents filed a Motion for Summary Judgment on August 17, 1998. The Magistrate for the United States District Court for the Northern District of Mississippi

(Eastern Division) rendered the Memorandum Opinion on September 2, 1998, granting summary judgment in favor of the Respondent. The Magistrate's Final Judgment was entered on September 2, 1998, dismissing Langford's complaint, with prejudice.

The Magistrate's Final Judgment was appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed, per curiam, on May 13, 1999. *Langford v. Makita*, 181 F.3d 96 (5th Cir. 1999). Langford's petition for rehearing was denied by the panel on June 16, 1999.

The Makita Model LS1020 miter saw which caused Langford's injury was manufactured in 1990 and was purchased by Langford's employer in the fall of 1994 from a Makita distributor. There is no dispute that the blade guard on the saw was missing, either having broken off during use or having beenintentionally removed by Langford's employer to increase the speed at which the employees could work. Langford, who worked to support her family, had never previously worked around power saws and did not fully appreciate or understand the danger of using a miter saw without the blade guard in place. Even if Langford had fully appreciated or understood the danger of using a miter saw without the blade guard in place, her refusal to use the saw would have caused her to lose her job.

On the day of her injury, Langford was cutting plastic molding. As she released the trigger on the Makita saw, the spinning saw blade caught the material Langford was holding in her left hand and pulled her hand and forearm into the blade. Langford's left hand and arm were seriously and permanently injured. Langford's left wrist was cut so severely that, without being supported, the hand would have

dangled. Langford has undergone four major surgeries and the injury has left her permanently and totally disabled.

Langford brought suit against Makita under Mississippi's products liability statute, Section 11-1-63 of the Mississippi Code of 1972, Annotated, as amended, alleging, *inter alia*, negligent design. The basis for Langford's charge of negligent design was that the Model LS1020 Makita miter saw would operate without the blade guard being in place. Langford produced evidence indicatingMakita knew or should have known that serious injury could occur if this saw was operated without the blade guard. Langford also produced evidence indicating that Makita knew or should have known that users such as Belmont Homes, Inc., and other similarly situated manufacturers, would use miter saws without blade guards for many reasons, including increased speed of production.

Langford charged that Makita's Model LS1020 miter saw could have, and should have been, designed with an interlock which would render the saw incapable of operating if the blade guard was missing. Makita's corporate representative testified in a deposition that the Model LS1020 miter saw was introduced as a product in 1987 and that Makita understood that it was "highly possible" that the blade guard could be removed, yet Makita did not incorporate an interlock into the design of the saw which would render the saw incapable of operating if the blade guard was missing. Langford produced evidence that an electrical interlock device was patented in the United States in 1975 and that the cost of the electrical interlock device was approximately $5.05. Langford also produced evidence that a mechanical interlock device for a saw was patented in the United States in 1986 and that the cost of incorporating the mechanical

interlock device on the Model LS1020 miter saw was negligible. Langford produced expert testimony that her injuries would not have occurred if theModel LS1020 miter saw which destroyed her hand had had either a mechanical interlock or an electrical interlock which would have rendered the saw inoperable if the blade guard was missing.

The Magistrate, on September 2, 1998, granted Makita's summary judgment motion because the Magistrate found that the saw had been substantially altered after it left Makita's control, that this substantial alteration was the cause of Langford's injuries and that Langford was aware of the danger the altered saw presented but continued to use the saw. The basis of the Magistrate's finding that the saw had been substantially altered was the fact that the blade guard was missing. The final judgment dismissing Langford's complaint, with prejudice, was entered on September 2, 1998.

Langford appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed Magistrate's action in a per curiam opinion filed on May 13, 1999. The Fifth Circuit held that all of Langford's claims are governed by Section 11-1-63 of the Mississippi Code of 1972, Annotated, as amended, and that, under that statute, a manufacturer has no liability unless the plaintiff proves that the product was defective when it left the manufacturer's control. The Fifth Circuit went on to state that, under Section 11-1-63, a manufacturer is not liable if the plaintiff knew of the defective condition and voluntarily continued to usethe product. The Fifth Circuit ruled: "[W]e conclude that the district court correctly determined that no reasonable juror could have reached any conclusion except that the saw was substantially altered and that Langford voluntarily assumed the risk of using it in a defective condition."

Langford filed a petition for rehearing which was denied by the Fifth Circuit on June 16, 1999.

The Petitioner has filed a Petition for Writ of Certiorari based upon the issues and argument presented herein.

ARGUMENT

WHETHER THE PETITIONER'S FUNDAMENTAL RIGHTS TO FAIR, IMPARTIAL AND EQUAL JUSTICE WERE DENIED BY THE FAILURE OF BOTH THE COURT OF APPEALS AND THE DISTRICT COURT TO FOLLOW THE *ERIE* DOCTRINE IN FAILING TO APPLY AND FOLLOW STATE LAW BY GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER AND WHETHER, BY FAILING TO FOLLOW THE *ERIE* DOCTRINE, THE COURT OF APPEALS AND THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The United States District Courts are required to follow the law of thestate as declared by its highest court in cases where jurisdiction of the federal court is based exclusively on diversity of citizenship. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1937).

Langford properly brought claims of negligent design against Makita. Negligent design has long been recognized as a cause of action under Mississippi common law. *State Stove Manufacturing Company v. Hodges*, 189 So.2d 113

(Miss.1966); *Alley v. Praschak Machine Company*, 366 So.2d 661 (Miss. 1979); *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So.2d 248 (Miss. 1993). A cause of action for negligent design is also incorporated into Mississippi's products liability statute. Miss. Code Ann. §11-1-63 (Supp. 1998).

Under Mississippi's statutory enactment, Langford was required to prove by a preponderance of the evidence that at the time the Makita Model LS1020 miter saw left the control of the manufacturer it was designed in a defective manner. Miss. Code Ann. §11-1-63(a)(i)(3) (Supp. 1998). Langford also had the burden of showing, by a preponderance of the evidence, that at the time the Model LS1020 miter saw left the control of Makita that the manufacturer knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage, and that thereexisted a feasible design alternative that would have, to a reasonable probability, prevented the harm. Miss. Code Ann. §11-1-63(f) (Supp. 1998).

As succinctly stated in the per curiam opinion of the Fifth Circuit:

> The district court granted Makita's motion for summary judgment because: (1) the saw had been substantially altered after it had left Makita's control, and this substantial alteration was the cause of Langford's injuries; and (2) Langford was aware of the danger of the altered saw presented and nevertheless continued to use it.

However, under Mississippi law neither of these two stated reasons for allowing summary judgment is proper.

Under Mississippi law, the fact that a product has been substantially altered is not a complete defense to a claim of negligent design:

> If the plaintiff can establish negligence of design, directions or warnings, he not only has established fault despite the fact that the product may be operating satisfactorily and smoothly after the accident, but also that the defect existed when the product left the manufacturer's plant, regardless of undue wear or mishandling thereafter.

Ward v. Hobart Manufacturing Company, 317 F.Supp. 841, 847-848 (S.D. Miss., 1970).

Langford's claim against Makita is that Makita knew or, in the light of reasonably available knowledge or in the exercise of reasonable care, shouldhave known that the blade guard would or could be removed from the Model LS1020 miter saw and that there existed a reasonable design alternative which would have, to a reasonable probability, prevented Langford's injury. The reasonable design alternative claimed by Langford is the incorporation of either a mechanical or an electrical interlock device which would render the saw inoperable without the blade guard being in place. For the Magistrate to rule that because the blade guard was missing Makita can have no liability turns Langford's claim for negligent design completely inside out. Langford's claim is that removal or breakage of the blade guard was reasonably foreseeable and that, therefore, it was negligent

design not to incorporate an interlock device which would have rendered the saw inoperable in the absence of the blade guard. Langford supported her claim with proof that such interlock devices exist, are inexpensive and do not impair the utility, usefulness, practicality or desirability of the miter saw. Langford also presented proof that, had such a device been incorporated into the design of the saw, she would not have been injured.

Thus, under Mississippi law, a question of fact was presented for determination by the jury and summary judgment was improper.

Additionally, the Magistrate concluded "there is no genuine issue ofmaterial fact that the aw had been substantially altered by the guard being removed or broken off . . .." Under Mississippi law, if there is substantial evidence that the deformity (which, in this case, was the missing blade guard) is due to wear and tear, a jury question is presented. *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So. 2d 248, 262 (1993). Langford produced substantial evidence that the missing blade guard was due to wear and tear. Mississippi law provides that if the injured party produces expert testimony to the effect that a properly designed product would not have caused the injury, even with lack of proper maintenance, then the evidence is sufficient to send the question to the jury. *Mozingo v. Correct Manufacturing Corporation*, 752 F. 2d 168, 177-178 (5th Cir. Miss., 1985).

The Magistrate's second basis for granting summary judgment, that the "plaintiff assumed the risk," is also improper under Mississippi law. Mississippi law follows the doctrine of comparative negligence. Miss. Code Ann.

§11-7-15 (1972); *Horton v. America Tobacco Co.*, 667 So.2d 1289 (Miss. 1995). The defense of assumption of risk, rather than being an absolute bar to recovery by the plaintiff, has been held by the Mississippi Supreme Court to have been "subsumed in our comparative negligence doctrine." *Horton*, 667 So.2d at 1293. Summary judgment cannot, under Mississippi law, be founded uponassumption of risk since apportionment of negligence between the plaintiff and the defendant is the exclusive province of the jury:

> [A]ssumption of the risk on the part of the plaintiff merely goes to the percentage of fault attributable to the plaintiff; it no longer affords a complete defense to the defendant unless the jury finds that the plaintiff's assumption of risk proportionately reduces damages to zero.

Donald v. Triple S Well Service, Inc., 708 So.2d 1318, 1325 (Miss. 1998). This position was recently reinforced by the Mississippi Supreme Court:

> We take this opportunity to hold once again that the assumption of risk doctrine is subsumed into comparative negligence. Any actions which might constitute an assumption of risk should be dealt with only in the context of the comparative negligence doctrine. A jury is always free to decide that an act which constitutes an assumption of risk was the sole proximate cause of a plaintiff's injuries. We see no reason why acts which might constitute an assumption of risk should, as a matter of law, create a complete bar to recovery. The

> comparative negligence doctrine gives juries great flexibility in reaching a verdict. Any fault on the part of the plaintiff should be considered only in the context of comparative negligence.

Churchill v. Pearl River Basin Development District, ____ So.2d ____, No. 96-CA-01384-SCT (¶12) (Miss. 1999).

Thus, under Mississippi law, summary judgment cannot be granted upon the basis of assumption of risk because assumption of risk is a jury question.

Additionally, the Mississippi Supreme Court has declared that the defenseof assumption of risk is not available to a defendant "unless the defendant admits the existence of a risk." *Wilks v. American Tobacco Company*, 680 So.2d 839, 843 (Miss. 1996). Therefore, Makita cannot use assumption of risk as a defense without first admitting that, in using the saw, Langford was exposed to a danger. Makita did not admit that the Model LS1020 saw was negligently designed and cannot, therefore, assert assumption of risk. The Magistrate's grant of summary judgment based upon assumption of risk was clearly contrary to established and well-settled Mississippi. If, in order to make the defense of assumption of risk available to it, Makita admits that there was a danger of injury to Langford in using the Model LS1020 without a blade guard in place, it then becomes a jury question whether Makita's failure to incorporate an interlock device, which would render the saw inoperable in the absence of the blade guard, was negligent design. Again, because this is a jury question, summary judgment was improper under Mississippi law.

Federal courts in Mississippi have recognized that, in diversity cases, they are "*Erie* bound" to follow the substantive law of Mississippi. *Mozingo v. Correct Manufacturing Corporation*, 752 F.2d 168, 173 (5th Cir. 1985).

The Mississippi Supreme Court has declared that it is its sole province to decide matters of state law. *Sperry-New Holland, a Div. of Sperry Corp. v.Prestage*, 617 So. 2d 248, 256 (1993).

The Fifth Circuit has recognized the right of the Mississippi Supreme Court to determine, in a products liability case, that misuse is a jury question. *Edwards v. Sears, Roebuck and Company*, 512 F.2d 276, 289 (5th Cir. Miss. 1975). The Fifth Circuit has held that, in a product liability action in Mississippi, if an employer (such as Belmont Homes in this case) negligently maintains or omits to maintain the product, the conduct of the employer is not the sole proximate cause as a matter of law. *Lenoir v. C. O. Porter Machinery Company*, 672 F.2d 1240, 1244-1245 (5th Cir. Miss. 1982). The rulings of both the district court and the court of appeals ignored established and well-settled Mississippi law, which, under the *Erie* doctrine, they were duty bound to follow and apply. If either the court of appeals or the district court had any questions about the law of Mississippi to be applied in this case, such questions should have been resolved by certifying them to the Mississippi Supreme Court. *Lehman Brothers v. Schein*, 416 U.S. 386, 94 S. Ct. 1741 (1974).

Langford, a working mother who was permanently and totally disabled, saw her complaint dismissed, with prejudice, by the United States District Court of the Northern

District of Mississippi. This action was affirmed by the United States Court of Appeals for the Fifth Circuit. The rulings of both the districtcourt and the court of appeals ignored established and well-settled Mississippi law, which, under the *Erie* doctrine, they were duty bound to follow and apply. This failure denied fair, impartial and equal justice to Langford. This Court cannot allow, condone or permit the rights of innocent victims such as Langford to be trampled by the district courts or the courts of appeals, which seem more interested in docket management than in seeing that justice is done. This action by both the court of appeals and the district court is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Therefore, this Court should grant this Petition.

CONCLUSION

The United State District Court for the Northern District of Mississippi (Eastern Division) ignored and failed to follow and apply established and well-settled Mississippi law and granted summary judgment, dismissing, with prejudice, the Petitioner's products liability cause of action. The district court, by ignoring and failing to follow and apply Mississippi law, violated the *Erie* doctrine in this diversity of citizenship case. The Petitioner was a working mother who was permanently and totally disabled by a Makita saw the Petitioner claims was negligently designed. The Petitioner's fundamental rightsto fair, impartial and equal justice were violated by the district court's action in granting summary judgment in favor of Makita when Petitioner's proof clearly made out a jury question under established and well-settled Mississippi law.

The United States Court of Appeals for the Fifth Circuit also ignored and failed to follow and apply established and well-settled Mississippi law by affirming the action of the district court. This was a second violation of the *Erie* doctrine and was a further violation of the Petitioner's fundamental rights to fair, impartial and equal justice.

This Court should grant *certiorari* review because the actions of both the court of appeals and the district court are such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. It is incumbent upon this Court to protect the fundamental rights to fair, impartial and equal justice of the Petitioner, and other similarly situated citizens are wrongfully denied their day in court, then support for our system of justice is further eroded. Legal rhetoric should not be exercised to sidestep critical issues of society; otherwise, no one will believe that the system is just.

Respectfully submitted,

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98-60764

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Langford

v.

Makita Corporation

May 13, 1999, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION: Affirmed.

CIVIL ACTION NO. 1:97CV139-JAD

LINDA DARLENE LANGFORD,
PLAINTIFF

VS.

MAKITA U.S.A., INC., AND MAKITA CORPORATION
DEFENDANTS

GEORGIA CASUALTY & SURETY COMPANY,
INTERVENOR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

September 2, 1998, Decided

September 2, 1998, Filed

COUNSEL:

For LINDA DARLENE LANGFORD, plaintiff: John Booth Farese, FARESE, FARESE & FARESE, Ashland, MS. Gene Hamby, Jr., GENE HAMBY, JR., ATTORNEY, Sheffield, AL.

For GEORGIA CASUALTY & SURETY COMPANY, intervenor-plaintiff: Timothy Reese Balducci, WEBB, SANDERS, DEATON, BALDUCCI, & SMITH, Oxford, MS. Dennis W. Voge, MITCHELL, VOGE, BEASLEY & CORBAN, Tupelo, MS.

For MAKITA USA, INC., defendant: David L. Ayers, WATKINS & EAGER, Jackson, MS.

For MAKITA CORPORATION, defendant: Mark D. Jicka, WATKINS & EAGER, Jackson, MS.

JUDGES:
JERRY A. DAVIS, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
JERRY A. DAVIS

OPINION:

MEMORANDUM OPINION

The defendants have filed motions for summary judgment in this products liability case asserting that the subject miter saw was not in substantially the same condition as when it left the custody and control of the defendants and that plaintiff assumed the risk. Having considered the submissions of the parties, the court finds the motion should be granted.

FACTUAL BACKGROUND

Plaintiff Langford was seriously injured at her place of employment, Belmont Homes, on February 10, 1995, while using a miter saw, Model LS1020, manufactured by the defendants in December, 1990. Several days before the accident Ms. Langford had noticed that the guard was missing from the saw, either broken off or removed. When she advised her supervisor of this fact and that someone may get hurt, she was told that maintenance had been notified. Fearful of losing

her job if she didn't continue to work, plaintiff continued to use the saw without the guard until her injury. The safety trigger on the subject saw had also been taped in a depressed condition so that it continued to run as long as power was supplied.

There is no question that the saw left the control of the defendant with a clear plastic guard in place, with warnings in the instructions manual and on a label of the saw itself not to operate the saw without the guard in place, and with a safety trigger that must be depressed for the saw to start. The warning label remained on the saw involved in plaintiff's accident. The model saw involved in this accident had warnings in 1987 and 1988 that it was for residential use only. In 1990 there was no restriction for residential use only. Plaintiff submits that defendant knew that the saw was being used in an industrial setting and that guards were being removed to speed up the operation of the saw. It is plaintiff's contention that it was foreseeable for defendant to know that the guards were being removed and that the saw should have been equipped with an interlock that would have prevented the saw from operating if the guard was removed. Such interlock technology has been in existence for many years.

Plaintiff's testimony reflects that she was aware of the danger of operating the saw without the guard but she feared losing her job if she refused. Both plaintiff's and defendants' experts agree that the accident would not have occurred if the guard had been in place as manufactured.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).* Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).* "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).* The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. *Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1994).*

LEGAL DISCUSSION

In Mississippi the law is clear that a product be in substantially the same condition at the time of a plaintiff's injury as the product was when it left the custody and control of the defendant. *State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971).* This case law has also been endorsed by the Mississippi legislature in products liability legislation enacted in 1993 requiring that the product be in the same condition as it was when it left the control of the manufacturer or seller before finding liability. Miss. Code Ann. § 11-1-63 (Supp. 1997). Accordingly, the Court must focus on whether the miter saw was defective and unreasonably dangerous when it

left the control of defendants and whether plaintiff's injuries were proximately caused by the defective condition. In the instant case the facts show that the saw was not in the same condition as it was when it left Makita. The safety trigger had been taped in the depressed condition and the plastic guard was missing. Both of these safety features had either been bypassed by plaintiff's employer or the guard had not been timely repaired.

Plaintiff argues that the saw in this case was not intended for industrial use and that technology was in place that would allow for the saw to be disabled if the guard was removed. First, a manufacturer is not an insurer against accidental injury from the use of its product. *Ward, supra at 1187.* Second, the facts before the court are unchallenged that the injury would not have occurred if the guard had been on the saw as it was when it left the hands of the defendants. If the product has been substantially modified or altered by a third party and the manufacturer has played no part in the modification, the manufacturer cannot be held liable if the modification caused the injury. *Creel v. General Motors, 233 So. 2d 105, 109 (Miss. 1970).* While it may be technologically possible to place an interlock system on a saw, plaintiff has no proof that she would have been hurt absent the modification by her employer. In fact, the proof is to the contrary.

Moreover, the court finds that plaintiff knew of the danger of using the saw without the guard, advised her supervisor that someone could get hurt, and, yet, continued to use the saw. Assumption of the risk in this context is recognized by the law of Mississippi and acts as a bar to any recovery by plaintiff against the defendants. Miss. Code Ann. § 11-1-63(d)(Supp. 1997); see also, *Materials Transportation Co. v. Newman, 656 So. 2d 1199, 1203, n. 1 (Miss. 1995).*

Plaintiff may not avoid the assumption of risk defense by using the fear of termination from her employment. *Hedgepeth v. Fruehauf Corp., 634 F. Supp. 93 (S.D. Miss. 1986),* aff'd *813 F.2d 405 (5th Cir. 1987).*

CONCLUSION

Plaintiff in this case suffered a serious injury at her workplace using defendants' saw. However, there is no genuine issue of material fact that the saw had been substantially altered by the guard being removed or broken off and the safety trigger taped in a depressed condition. Plaintiff's accident would not have occurred absent these modifications to the saw's safety features. Also, plaintiff was aware of the dangerous condition of the guard being absent, talked to her supervisor about the guard, and continued to work with the saw. There is no issue of material fact that plaintiff assumed the risk. Therefore, defendants' motions for summary judgment are granted. A separate judgment will be entered

This 2nd day of September, 1998.

JERRY A. DAVIS
UNITED STATES MAGISTRATE JUDGE

CIVIL ACTION NO. 1:97CV139-JAD

LINDA DARLENE LANGFORD,
PLAINTIFF

VS.

MAKITA U.S.A., INC., AND MAKITA CORPORATION
DEFENDANTS

GEORGIA CASUALTY & SURETY COMPANY,
INTERVENOR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

September 2, 1998

FINAL JUDGMENT

In accordance with the memorandum opinion issued this day, defendants' motion to dismiss be and hereby is granted and this cause is hereby dismissed with prejudice.

IT IS SO ORDERED

U.S. COURT OF APPEALS
FILED
JUN 16 1999
CHARLES R. FULBRUGE III
CLERK

98-60764

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LINDA DARLENE LANGFORD,
PLAINTIFF - APPELLANT

VS.

MAKITA CORPORATION OF AMERICA; ET AL
DEFENDANTS

MAKITA U.S.A., INC., AND MAKITA CORPORATION
DEFENDANTS -APPELLEES

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.
PER CURIAM

IT IS ORDERED that the petition for rehearing filed in the above case is *denied*.

s/United States Circuit Judge

Supreme Court, U.S.
FILED
NOV 4 1999
OFFICE OF THE CLERK

No. 99-470

IN THE

Supreme Court of the United States

LINDA DARLENE LANGFORD,

Petitioner,

v.

MAKITA U.S.A., INC., and MAKITA CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner, Linda Darlene Langford, was injured at her place of employment, Belmont Homes, Inc., while using a miter saw model LS1020 manufactured by Respondents ("Makita"). Langford was injured because the safety guard covering the blade of the saw was intentionally broken off or forcibly removed by someone at Belmont Homes. It is undisputed that Langford would not have been injured had this safety guard been in place. It is also undisputed that Langford knew that the guard had been removed and that it was unsafe to use the saw in this altered condition.

In this products liability action governed by Mississippi law, Langford seeks to recover for her injuries against Makita under various causes of action, including strict liability, negligent design and failure to warn. In granting Makita's Motion for Summary Judgment, the District Court and Court of Appeals correctly applied Mississippi law and properly found that, based on the undisputed facts, all of Langford's claims were barred because the miter saw was substantially altered after it left Makita and, alternatively, because Langford assumed the risk of using the miter saw without a safety guard in the course of her employment with Belmont Homes. Accordingly, the only questions presented by the Petition are:

1. Whether the Court of Appeals erred in affirming the District Court's ruling that the miter saw was substantially altered after it left Makita and that under Mississippi law this barred Langford's claims?

2. Whether the Court of Appeals erred in affirming the District Court's ruling that Langford assumed the risk of using the miter saw without a safety guard and that under Mississippi law this barred her claims?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below were Petitioner, Linda Darlene Langford, and Respondents, Makita Corporation of America, Makita U.S.A., Inc. and Makita Corporation. By agreement of the parties and Order dated July 22, 1997, Makita Corporation of America was dismissed from this action, without prejudice.

Pursuant to Rule 29.6 of this Court, Makita U.S.A. is a wholly owned subsidiary of Makita Corporation, a corporation organized under the laws of Japan (hereinafter collectively "Makita"). Makita Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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No. 99-470

In the
SUPREME COURT OF THE UNITED STATES

LINDA DARLENE LANGFORD,

Petitioner,

v.

MAKITA U.S.A., INC., and MAKITA CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Makita U.S.A., Inc., and Makita Corporation, hereby file and serve this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Linda Darlene Langford, as follows:

OPINIONS BELOW

By Memorandum Opinion and Final Judgment entered September 2, 1998, the District Court granted summary judgment in favor of Makita. Langford filed a Motion to Reconsider, which the District Court denied on November 5, 1998. Langford appealed the grant of summary judgment and the corresponding denial of her request for reconsideration to the United States Court of Appeals for

the Fifth Circuit. By way of an unreported, per curium opinion dated May 13, 1999, the Court of Appeals affirmed. That opinion was not included in the Appendix to the Petition and is therefore set forth as an Appendix to this Brief in Opposition. Langford filed a petition for rehearing which the Court of Appeals denied on June 16, 1999.

COUNTER-STATEMENT OF THE CASE

On February 10, 1995, Langford was injured at her place of employment, Belmont Homes, while using a miter saw model LS1020 manufactured by Makita in 1990. The miter saw left Makita equipped with a sturdy, clear, plastic safety guard which was designed to prevent the user from coming into contact with the spinning blade. Warnings set forth on the saw itself and in the accompanying instruction manual instructed the user not to operate the miter saw unless the safety guard was in place and operating smoothly. The safety guard of the miter saw was missing at the time Langford was injured.

It is undisputed that the miter saw left Makita's custody and control equipped with an operable safety guard. The only proof in the record is that the safety guard was subsequently intentionally broken off or forcibly removed by someone at Belmont Homes. The miter saw which injured Langford was being used at Belmont Homes without a safety guard in violation of the manufacturer's warnings. It is undisputed that the safety guard if not removed would have prevented Langford's injuries.

Langford knew that the miter saw was supposed to have a safety guard covering the blade. She also knew that Belmont Homes had removed the safety guard from this saw

and other saws in the plant. Langford knew it was unsafe to operate a miter saw without the safety guard in place because she appreciated the danger of coming into contact with a spinning saw blade. Langford even complained about the missing safety guards to her supervisor at the plant. Yet, in spite of her appreciation of this danger, Langford continued to use the miter saw in its altered condition without the safety guard because she allegedly feared her employment with Belmont Homes would be terminated if she refused.

REASONS FOR DENYING THE WRIT

In her Petition, Langford re-urges the same arguments which she made twice before the District Court and twice before the Court of Appeals. The Petition should be denied because the decisions of the District Court and the Court of Appeals are correct, and in any event, these decisions turn solely on a straightforward application of Mississippi law to the particular facts of this case. The Petition simply does not present any important question for resolution by this Court; nor does it present any occasion for this Court to exercise its supervisory power.

I. THE DECISIONS BELOW WERE CORRECT

This case turns on two undisputed, material facts: (1) the miter saw which injured Langford was substantially altered after it left Makita's control in that someone at Belmont Homes intentionally removed a safety guard which, if in place, would have prevented Langford's injuries; and (2) Langford knew that the safety guard was missing and that the miter saw was dangerous in this altered condition, and yet she continued to use the saw in the course of her employment with Belmont Homes. Mississippi law is clear

that there can be no recovery against a manufacturer where the product is not defective when it leaves the manufacturer's possession and a subsequent, substantial alteration of the product is isolated as the intervening, sole proximate cause of the plaintiff's injury. Further, under Mississippi law, assumption of the risk is a complete defense in products liability actions. Because there is no genuine issue of material fact as to whether the miter saw was substantially altered or whether Langford assumed the risk of using the saw in this altered condition, the District Court and Court of Appeals correctly ruled that Makita was entitled to judgment as a matter of law.[1] Langford's suggestion that the lower courts failed to follow Mississippi law is simply wrong. The decisions below were correct and fully in accordance with Mississippi law.

A. The District Court and Court of Appeals Correctly Ruled that the Miter Saw Was Substantially Altered after it Left Makita and that under Mississippi Law this Barred Langford's Claims

Langford's claims against Makita in this action are governed by Mississippi's Products Liability Act, Miss. Code Ann. § 11-1-63. This Section applies "in any action for damages caused by a product" and provides causes of action for strict liability, negligent design and failure to warn. Miss. Code Ann. § 11-1-63(a)(i). Under § 11-1-63, the manufacturer of a product has no liability unless the plaintiff proves that the product was defective at the time it left the manufacturer's control, that the defect rendered the product unreasonably dangerous and that the defect proximately caused the plaintiff's injuries. Miss. Code Ann. § 11-1-63(a)(i)-(iii).

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1. The substantial alteration defense and the assumption of the risk defense provided alternative grounds for the lower courts to rule in favor of Makita.

By requiring the plaintiff to prove that her injuries were proximately caused by a defective condition that existed when the product left the manufacturer's control, section 11-1-63 embodies the firmly established common law defense of substantial alteration.[2] Prior to the enactment of § 11-1-63 in 1993, the Mississippi Supreme Court had long recognized that, in order to recover in a products liability action, the plaintiff must prove that the product was in substantially the same condition at the time of her injury as it was when it left the manufacturer's custody and control. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118-19 (Miss. 1966); *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 262 (Miss. 1993). There can be no recovery where the product is substantially altered after it leaves the hands of the manufacturer, and the alteration is isolated as the sole proximate cause of the plaintiff's injury. *Creel v. General Motors*, 233 So. 2d 105, 109 (Miss. 1970); *Ford v. Matthews*, 291 So. 2d 169, 174 (Miss. 1974). As succinctly stated by the Mississippi Supreme Court:

> [F]rom the evidence it must appear that the defect which was the proximate cause of the harm existed when the product left the possession of the manufacturer. In this State, as in most states, the burden of proving that when the accident occurred there had been no substantial change in the condition in which the product left the manufacturer is upon the plaintiff.

B.F. Goodrich v. Taylor, 509 So. 2d 895, 903 (Miss. 1987).

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2. *See* Miss. Code Ann. § 11-1-63(h) ("[n]othing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product").

In granting Makita's Motion for Summary Judgment, the District Court correctly found that the following material facts were undisputed:

> There is no question that the saw left the control of [Makita] with a clear plastic guard in place, with warnings in the instruction manual and on a label on the saw itself not to operate the saw without the guard in place, ... The warning label remained on the saw involved in [Langford's] accident. . . . Both [Langford's] and [Makita's] experts agree that the accident would not have occurred if the guard had been in place as manufactured.

App. at 4a. The District Court and Court of Appeals correctly applied Mississippi law to these undisputed facts and ruled that Makita was entitled to judgment as a matter of law as to all of Langford's claims because the miter saw was substantially altered after it left Makita's control and this alteration was the sole proximate cause of her injuries.

In her Petition, Langford does not dispute the dismissal of her strict liability and failure to warn claims. Langford's primary argument is that the District Court and Court of Appeals erred as a matter of law in applying the substantial alteration defense to her negligent design claim. Langford argues that the District Court and Court of Appeals overlooked a material fact question concerning whether the miter saw was negligently designed because it was not equipped with an interlocking mechanism which theoretically could have disabled the miter saw if the safety guard was removed. Langford argues that it was foreseeable that someone might subsequently intentionally remove the safety

guard, and therefore, Makita should have designed the saw with additional safeguards to prevent the user from coming into contact with the spinning blade. The District Court and the Court of Appeals considered and correctly rejected this argument because no matter how many different ways Langford attempts to present her claims, she cannot avoid the fact that the saw which injured her is not the saw which Makita manufactured. As the District Court properly observed: "While it may be technologically possible to place an interlock system on a saw, [Langford] has no proof that she would have been hurt absent the modification by her employer." App. at 6a.

Mississippi law is clear that the manufacturer of a product simply cannot be held liable under any theory of recovery if the product which causes injury is substantially different due to a material modification from the product which it manufactured. This is especially true where, as in this case, the product leaves the manufacturer equipped with a safety feature which, but for a subsequent alteration involving its forcible removal, would have prevented the plaintiff's injuries. The substantial alteration defense operates as a complete bar to Langford's claims, including her claim for negligent design, because she cannot prove that her injuries were proximately caused by a defective condition that existed when the miter saw left Makita's control.

Langford's argues in her Petition that the substantial alteration defense does not operate as a complete bar to her negligent design claim.[3] This argument is at odds with

3. Langford insinuates that the lower courts failed to follow Mississippi law as articulated in *Ward v. Hobart Mfg.*, 317 F. Supp. 841, 847-48 (S.D. Miss. 1970). Langford fails to mention that this (Cont'd)

§ 11-1-63 and Mississippi case law. The Mississippi Supreme Court has consistently upheld the dismissal of negligent design claims in products liability actions where the proximate cause of the plaintiff's injuries is an intervening act or omission (such as a substantial alteration of the product) that occurs after the product leaves the manufacturer's control.[4] For example, in *Thomas v. Munson Machinery Co.*, 463 So.2d 1044 (Miss. 1985), the Mississippi Supreme Court clearly indicated that an action for negligence or strict liability will not lie against a manufacturer where the product is not defective at the time it is sold, and an intervening cause is isolated as the sole proximate cause of the plaintiff's injuries. In *Thomas*, the employee of a chemical company sued the manufacturer of a chemical mixing machine for injuries suffered when the mixer accidently started while the employee was performing maintenance on it. The employee asserted causes of action (much like Langford's claims) for negligence and strict liability, alleging that the mixer was defective in that:

> (1) it was not equipped with any fail-safe device which would prevent the mixer from operating when the door was open, (2) it was not equipped

(Cont'd)
case was reversed as clearly erroneous on appeal in favor of the defendant-manufacturer. 450 F.2d 1126 (5th Cir. 1971). Langford also fails to mention that the quoted passage which she relies upon from the *Ward* decision is a summary of a law review article, not Mississippi law.

4. The Mississippi Supreme Court recognizes that the substantial alteration defense is in essence a question of proximate cause. *See Matthews*, at 174-75 (stating "[b]efore a defect in a product can be isolated as the cause [of injury], it must be shown that the product reached the consumer without substantial change in its condition").

> with any device which would shut off the mixer after part of a human body was caught in it . . . , and (3) there was nothing on the mixer warning users that it was in an unreasonably dangerous condition. . . .

463 So. 2d at 1045. The Court held that the manufacturer was not liable under either strict liability or negligent design theories because the mixer, as sold, was not defective and because the employer who purchased the mixer failed to install a disconnect switch as recommended by the manufacturer, which, if installed, would have prevented the accident. *Id.* at 1047 (upholding summary judgment in favor of the manufacturer).

The *Thomas* Court relied primarily on its earlier decision in *State Stove*, 189 So. 2d at 115-16, where the plaintiff's claims were likewise barred because of the intervening negligence of a third party. In that case, homeowners sued the manufacturer of a water heater which exploded and destroyed their home. The manufacturer sold the water heater with clear instructions directed to the installer to place a valve on the heater which, if installed, would have prevented the explosion. However, the third parties who installed the heater failed to install the valve. The Court held that the manufacturer was not liable under strict liability or negligence because (1) the water heater as manufactured was not defective, (2) the water heater was not expected to and did not reach the homeowner without a substantial change in the condition in which it was sold; and (3) the failure of the installers to place the valve on the heater was "an intervening, sole proximate cause of the damages suffered by [the homeowners]." *Id.* at 121-23.

Contrary to Langford's arguments, the decisions of the lower courts are fully in accordance with Mississippi law. The District Court and Court of Appeals correctly dismissed Langford's claims, including her claim for negligent design, because her injuries were proximately caused by a substantial alteration to the miter saw which occurred after it left Makita's control.

Langford's negligent design theory is also at-odds with the legal duty required of manufacturers. It is undisputed that Makita designed and produced the LS1020 miter saw with a safety guard which, if not subsequently removed, would have prevented Langford's injuries. Langford presented no evidence that the safety guard was itself defective or not sufficiently durable for ordinary use. In fact, the only record evidence is that the safety guard was intentionally broken off or forcibly removed by someone at Belmont Homes.

As a matter of law, Makita met its obligation to manufacture a reasonably safe product. *See Hall v. Mississippi Chemical Express, Inc.*, 528 So. 2d 796, 800 (Miss. 1988) (Mississippi law requires that products be "reasonably fit, not perfectly so"). Makita is not an insurer of its miter saws. *State Stove*, 189 So. 2d at 120; *Ward v. Hobart Mfg.*, 450 F.2d 1176, 1187 n.39 (5th Cir. (Miss.) 1971). Under Mississippi law, Makita was not required to design a fool-proof miter saw or to incorporate two safety features (a guard and an interlocking device) to protect against the same danger. *See Cooper v. General Motors Corp.*, 702 So. 2d 428, 443 (Miss. 1997) (a manufacturer owes no duty "to place two safety devices in a [product] to protect against essentially the same danger"); *Prestage*, 617 So. 2d at 256 (a manufacturer owes no duty to create a

completely safe product). Nor was Makita required to design and produce a miter saw with safety features which could not be defeated by subsequent modifications. *See Hall*, 528 So. 2d at 800 (the law does not impose a duty upon a manufacturer to design an accident proof or fool-proof product; nor does it require a manufacturer "to incorporate into his product every innovation which . . . might have rendered the product more safe"). The removal of the safety guard by Belmont Homes, no matter how foreseeable, is beyond the scope of Makita's legal responsibility.

As an aside, Langford argues that the District Court and Court of Appeals missed a genuine issue of material fact as to whether the safety guard was missing from the saw due to normal "wear and tear" or whether it was intentionally broken off or forcibly removed by someone at Belmont Homes. Langford states in her Petition that she presented "substantial evidence that the missing blade guard was due to wear and tear." (Pet. at 13). This statement is incorrect.[5] The only proof in the record is that the safety guard of the miter saw was intentionally broken off or forcibly removed by someone at

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5. Langford also mis-characterizes *Prestage*, 617 So. 2d at 262, as holding that the substantial alteration defense does not apply where the alteration of a product may be due to normal "wear and tear" associated with usage. *Prestage* does not stand for this proposition. In *Prestage*, the defendant-manufacturer argued that its grain auger had been substantially altered after it left its control. In upholding the denial of defendant's motion for directed verdict on this point, the Court noted that this argument was inconsistent with the testimony of the defendant's own expert who testified that other than normal "wear and tear" he found nothing significantly different about the condition of the auger from its condition when it was manufactured. In light of this testimony, the defendant could hardly claim that the auger was substantially altered after it left its control. This is certainly not the situation in the instant case.

Belmont Homes. The record is devoid of any competent evidence that the safety guard of the miter saw was itself defectively designed, that it was not sufficiently durable for ordinary use, that it was easily removable or that it showed any sign of normal wear and tear.

In any event, regardless of how or why the safety guard came to be missing, the miter saw was being used at Belmont Homes in violation of the manufacturer's warnings. Belmont Homes was responsible for maintaining equipment being used in its workplace in a safe working condition. Belmont Home's failure to replace the missing safety guard or to remove the miter saw from the workplace relieves Makita of any liability. *See Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1008 (5th Cir. (Miss) 1989) (where unsafe condition of machine develops because of employer's poor maintenance, the manufacturer is not liable). The District Court correctly recognized this, noting that the guard "had either been bypassed by [Belmont Homes] or . . . not been timely repaired." App. at 6a.

B. The District Court and Court of Appeals Correctly Ruled that Langford Assumed the Risk of Using the Miter Saw Without a Safety Guard and that under Mississippi Law this Barred Her Claims

The assumption of risk defense is a complete bar to recovery according to Mississippi's Product Liability Act. Section 11-1-63(d) provides in this regard:

> In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or seller shall not be liable if the claimant (i) had knowledge of a condition of

> the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

Miss. Code Ann. § 11-1-63(d); *see Materials Trans. Co. v. Newman*, 656 So. 2d 1199, 1203 n.1 (Miss. 1995) (noting that § 11-1-63 re-establishes assumption of the risk as a complete defense in products liability actions).

Based on the summary judgment record, the following facts are undisputed: Langford knew that the miter saw was supposed to have a safety guard covering the blade. She also knew that Belmont Homes had removed the safety guard from this saw and other saws in the plant. Langord knew it was unsafe to operate a miter saw without the safety guard in place because she appreciated the danger of coming into contact with a spinning saw blade. Langford even complained about the missing safety guards to her supervisor at the plant. Yet, in spite of her appreciation of this danger, Langford continued to use the miter saw in its altered condition without the safety guard because she feared her employment with Belmont Homes would be terminated if she refused. As the District Court correctly found: "[Langford] knew of the danger of using the saw without the guard, advised her supervisor that someone could get hurt, and yet, continued to use the saw. Assumption of the risk in this context is recognized by the law of Mississippi and acts as a bar to recovery by [Langford] against [Makita]." App. at 6a-7a.

In her Petition, Langford makes the same arguments concerning assumption of the risk that were considered and

rejected by the courts below. Langford first argues that the lower courts should have limited Makita to comparative negligence principles and not allowed it to advance an assumption of the risk defense on summary judgment. This argument is without merit. As set forth above, assumption of the risk is a complete defense under § 11-1-63.[6] Since the summary judgment record reveals no genuine issue of material fact as to whether Langford assumed the risk of injury, this defense operates as a complete bar to recovery.[7]

Langford's other argument is that the lower courts should not have allowed Makita to assert assumption of the risk as a defense at all because it did not "admit" the existence of a risk. This argument is without merit. Langford cites *Wilks v. American Tobacco Co.*, 680 So. 2d 839, 843 (Miss. 1996), for the proposition that a manufacturer cannot assert assumption of the risk as a defense unless it admits that its

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6. In her Petition, Langford cites *Donald v. Triple S Well Svc., Inc.*, 708 So. 2d 1318, 1325 (Miss. 1998) and *Churchill v. Pearl River Basin Development Dist.*, __ So.2d __, No. 96-CA-01384-SCT (§12) (Miss. May 27, 1999), for the proposition that assumption of the risk is not a complete defense but is instead subsumed within Mississippi's rule of comparative negligence. Langford fails to point out that neither case involves § 11-1-63. Moreover, plaintiff fails to cite *Newman*, 656 So. 2d at 1203 n.1, wherein the Mississippi Supreme Court clearly stated that § 11-1-63 re-establishes assumption of the risk as a complete defense in products liability actions.

7. The District Court and Court of Appeals correctly rejected Langford's contention that she did not "voluntarily" expose herself to the danger of using the miter saw without a guard because she felt compelled to operate the saw or risk losing her job with Belmont Homes. *See* App. at 7a (citing *Hedgepeth v. Fruehauf Corp.*, 634 F. Supp. 93 (S.D. Miss 1986), *aff'd*, 813 F.2d 405 (5th Cir. 1987)).

product poses a risk. However, *Wilks* involved a lawsuit against a cigarette manufacturer. The manufacturer "firmly denied that smoking was hazardous" and thus was not permitted to assert assumption of the risk as a defense. Langford's reliance on *Wilks* in this context is misplaced. Makita denies that its miter saw was defective and unreasonably dangerous because it was designed and equipped with a safety guard which, if in place, would have prevented Langford's injuries. However, unlike the cigarette manufacturer in *Wilks*, Makita has never taken the position in this litigation that its miter saw poses no hazard at all. Such a position would fly in the face of common sense because everyone knows that electric saws with spinning blades are dangerous. This is exactly why Makita equipped its miter saw with a safety guard.

The only conclusion which can be drawn from the undisputed facts of this case is that Langford assumed the risk of using the miter saw without a safety guard in the course of her employment with Belmont Homes. The District Court and Court of Appeals properly dismissed Langford's claims on this alternative basis.

II. THE PETITION DOES NOT PRESENT ANY IMPORTANT QUESTION

The District Court applied Mississippi law to the undisputed facts in this case and properly dismissed Langford's claims under Fed. R. Civ. P. 56. This ruling received the concurrence of the Court of Appeals. While Langford expresses her disagreement with these decisions, her Petition simply does not present a novel or important question of great public interest which requires resolution by this Court. The decisions below turn solely upon a

straightforward application of Mississippi law to the particular facts involved in this case. This Court is not a forum for correction of errors, and it does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Langford has failed to make such a showing.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MAY 13, 1999

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-60764
Summary Calendar

LINDA DARLENE LANGFORD,

Plaintiff-Appellant,

VERSUS

MAKITA CORPORATION OF AMERICA; ET AL,

Defendants,

MAKITA U.S.A., INC., and MAKITA CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Mississippi
(1:97-CV-139-JAD)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

Plaintiff-Appellant Linda Langford was injured while operating a Makita 10" Miter Saw, Model LS1020, at her workplace, Belmont Homes, Inc., in Belmont, Mississippi. She sued Defendants-Appellants Makita Corporation, *et al.*, ("Makita") for damages, alleging strict liability for the product design, negligent design, negligent testing, negligent manufacturing, and failure to warn.

The district court granted Makita's motion for summary judgment because: (1) the saw had been substantially altered after it had left Makita's control, and this substantial alteration was the cause of Langford's injuries; and (2) Langford was aware of the danger the altered saw presented and nevertheless continued to use it.

All of Langford's claims are governed by Section 11-1-63 of the Mississippi Code. Under Section 11-1-63, a product manufacturer has no liability unless the plaintiff proves that the product was defective at the time it left the manufacturer's control. In addition, Section 11-1-63 provides that the manufacturer shall not be liable if the plaintiff was aware of the defective condition and voluntarily continued to use the product.

After reviewing the record, we conclude that the district court correctly determined that no reasonable juror could have reached any conclusion except that the saw was substantially altered and that Langford voluntarily assumed the risk of using it in a defective condition. Under these circumstances, Langford could not have prevailed on any of her claims. The judgment of the district court is therefore

AFFIRMED.